

December 31, 1998

MEMORANDUM TO: Chairman Jackson

FROM: Hubert T. Bell
Inspector General

SUBJECT: NRC STAFF'S HANDLING OF HARASSMENT AND
INTIMIDATION (H&I) COMPLAINTS AT MILLSTONE
(CASE NO. 99-01S)

Attached is the Office of the Inspector General, U.S. Nuclear Regulatory Commission (NRC) Event Inquiry regarding the NRC staff's handling of certain H&I complaints at the Millstone Nuclear Power Plants. This inquiry was based on a request from members of the Connecticut congressional delegation dated September 1, 1998.

Please call me if you have any questions regarding this Event Inquiry. This report is furnished for whatever action you deem appropriate. Please notify this office within 90 days of what action, if any, you take based upon the results of this Event Inquiry.

Attachment: As stated

cc w/attachment:

Commissioner Dicus
Commissioner Diaz
Commissioner McGaffigan
Commissioner Merrifield
W. Travers, EDO

OFFICE OF THE INSPECTOR GENERAL
EVENT INQUIRY



NRC STAFF'S HANDLING OF HARASSMENT
AND INTIMIDATION (H&I) COMPLAINTS AT MILLSTONE

CASE NO. 99-01S

Date

Hector Santana

Date

William J. Stryker

James E. Childs, Assistant
Inspector General for Investigations

Date

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BASIS AND SCOPE

On September 1, 1998, three members of the Connecticut Congressional delegation sent a letter to the Inspector General at the U.S. Nuclear Regulatory Commission (NRC) requesting, among other things, a review of the process and specific conclusions contained in several investigations conducted by the NRC Office of Investigations (OI). The investigations dealt with complaints of harassment and intimidation (H&I) by former employees at the Millstone Nuclear Power Plants resulting from a January 11, 1996, layoff. The members of Congress sent a letter containing similar concerns to the Chairman of the NRC. The Chairman, in turn, forwarded that letter to the attention of the Office of the Inspector General (OIG).

This OIG Event Inquiry report addresses the two concerns contained in the Congressional correspondence questioning the NRC staff's investigation and subsequent enforcement action stemming from allegations of H&I in connection with the January 1996 lay off at the Millstone plants. OIG responded to the other issues set forth in the September 1, 1998, letter from Congress in separate correspondence to the members of Congress.

BACKGROUND

On January 11, 1996, Northeast Utilities (NU) terminated approximately 102 employees reportedly as part of a cost-cutting program. Shortly following the Reduction in Force (RIF), the NRC received allegations that some of the terminated employees were targeted based on past involvement in protected activities. On February 8, 1996, the NRC requested information from NU on the process used to identify the employees to be terminated as well as specific information on 23 of the employees who were terminated. The list of 23 employees included the names of some individuals known by Region I, NRC, to have been involved in protected activities in the past as well as other names chosen at random from the list of terminated employees. NU responded to the NRC request for information on February 15, 1996.

NRC Creates Task Force to Review NU Workforce Reduction Process

Based on the NU response to the Region I request for information, the NRC created a task force in early March 1996 for the purpose of conducting an independent review of the NU workforce reduction process and how the process was applied to Millstone employees. The task force was to determine if there was information that the RIF process was used as a mechanism by NU to terminate employees who had previously engaged in protected activities. The NRC task force did not investigate individual cases of employee termination: it examined the process used by NU to identify the employees selected for termination. The NRC task force was made up of a senior attorney from the Office of the General Counsel (OGC), a representative from the Office of Investigations (OI), a member of the NRC technical staff, and an investigator from the U.S. Department of Labor (DOL).

The task force learned that NU used a “matrix process” which numerically rated employees from 1 to 10 in ten separate areas of job requirements/competencies. The 10 competency areas were: Education, Related Experience, Job Knowledge, Job Performance, Commitment to Change, Leadership, Teamwork, Communication, Planning/Organization/Decision Making, and Effectiveness. Each of the job requirements/competencies areas were, in turn, weighted from 1 to 10 based on comparison groups identified by a NU task force overseeing the process. The groups were: managers, supervisors, exempt (non-supervisory), technicians, clerical, and physical (non-union). Union employees were handled separately in accordance with the collective bargaining agreements.

Following completion of the matrices by NU managers and identification of those employees to be terminated, the licensee conducted a series of separate reviews by 1) Human Resources, 2) an Executive Review Committee, 3) an Equal Employment/Diversity group, and 4) an “Added Assurance” Review by legal personnel.

In connection with the “Added Assurance” review, knowledgeable managers at NU were asked to identify those employees slated for termination who had previously raised “concerns”. For purpose of the review, a “concern” was defined broadly by NU to include: “any nuclear or

industrial safety concern, grievance, differing professional opinion or any issue raised by an employee that remotely could be characterized as a safety concern or any employee who testified previously before the NRC, including the Office of Investigations, as well as anyone who had been interviewed in connection with or appeared as a witness at a Department of Labor hearing.”

Task Force Conducts Interviews and Briefs NRC Senior Management

The NRC task force conducted transcribed interviews of present and former NU employees, supervisors and managers during March-April 1996. On April 19, 1996, the task force briefed senior NRC management officials at NRC Headquarters including the Executive Director for Operations (EDO) and the OI Director. At that briefing, the task force provided information which suggested that the matrix process may have been misused by an NU manager to target whistleblowers in at least two instances. At the April 19 briefing, the task force was directed to discontinue their inquiry and turn the instances of suspected discrimination over to OI for further investigation.

OIG learned that at the April 1996 briefing, the task force was told not to prepare a written report of their activities. Subsequently, on September 11, 1996, the task force was instructed by senior agency management to prepare a written report. The task force report contained information that in at least two instances the matrix process may have been misused by a NU Senior Vice President to target “whistleblowers” for termination. That report was provided to a limited group of senior agency officials on October 3, 1996. While the precise reason for the initial direction to the task force not to prepare a written report on the results of its review could not be determined, the Director of OI believed that it was to preserve the integrity of the ongoing OI investigative process. In light of the fact that the OI investigations were still ongoing in September 1996, the OI Director was not certain what led to the subsequent decision to have the task force prepare a report. The EDO was contacted by OIG and he could not specifically recall the reason for the initial decision not to prepare a task force report, although he believed the fact that the matter was being referred to OI for additional investigation may have influenced that decision. The EDO could not recall the reason for the later direction for the task force to prepare a written report.

Region I Receives Allegations from Terminated NU Employees

OIG review of allegation files at Region I reflected a total of 22 individuals who expressed concerns with the manner in which the January RIF was conducted by NU. The allegations came to the attention of Region I through several means, including interviews conducted by the task force, letters to the NRC, and personal contact by the allegor. All of the allegations but one were received between January 12, 1996, and June 25, 1997. The final allegation was not received until June 1998.

The allegations of H&I in connection with the January 1996 RIF were discussed at Allegation Review Boards (ARB) held on various dates at Region I. Several were discussed at more than one ARB. Of the 22 allegors, Region I records reflect that 17 were interviewed by either the

NRC task force or OI. Of the five allegeders who were not interviewed, two declined to be interviewed, two allegeders failed to provide sufficient *prima facie* evidence of a violation in their initial allegation, and the remaining allegeder's claim was being actively investigated by DOL. NRC Management Directive 8.8 (Management of Allegations) allows the agency the option of not conducting an investigation in cases being actively pursued by DOL.

The ARB decided to have OI conduct investigations on the allegations which presented the strongest evidence of discrimination. OIG was told by NRC management officials that the decision not to have OI investigate each allegation was based, in part, on OI resource considerations. Another factor contributing to the decision was the fact that the NRC did not need to prove multiple cases of discrimination by a licensee in order for the agency to take enforcement action. As a result, the agency decided to concentrate on the cases with the most potential for substantiating H&I.

The remaining allegations which were not investigated by OI were maintained in an open status pending completion of the OI investigations. Region I intended to use the OI cases as the basis for an overall assessment of the RIF process. A total of four cases involving eleven allegeders were ultimately opened by OI. Two of the eleven allegeders declined to be interviewed by OI.

The NRC Agency Allegations Advisor (AAA) told OIG that NRC Management Directive 8.8 (Management of Allegations) set forth the agency procedures regarding the handling of H&I allegations. According to the Management Directive, there was no agency requirement for OI to investigate each allegation of H&I. The AAA explained that the purpose of the NRC's investigation into allegations of H&I was not to make the individual whole (i.e., back pay, reinstatement); DOL has that responsibility. Rather, the NRC investigation was designed to determine if the actions of the licensee resulted in a violation of 10 CFR 50.7 (Employee Protection) and created an environment at work where employees were reluctant, or "chilled", from bringing health and safety concerns to the attention of licensee management or NRC. In order to make a finding of a "chilled" environment, the NRC did not need to investigate each complaint. The AAA advised that a decision was made to investigate the cases which provided the strongest evidence of H&I. He was unaware of any upper limit placed on the number of investigations that OI would open regarding the January 1996 layoffs. He said that each allegation was individually assessed for possible OI investigation at an ARB.

OI Conducts Investigations into Certain Discrimination Complaints

The four OI investigations of alleged H&I with respect to the January 1996 RIF layoffs were completed on the following dates: 1-96-007- November 21, 1996; 1-96-014 - April 23, 1997; 1-96-034 - June 27, 1997; and 1-96-048 - August 5, 1997. The cases were referred to the U.S. Attorney's Office in New Haven, Connecticut for prosecutive consideration.

OI Reports on Millstone Do Not Contain Conclusions at Request of DOJ

OIG found that the OI reports of investigation relating to the January 1996 RIF at NU did not contain synopses, conclusions or agents' analyses of the evidence. This was a departure from the normal OI report process. According to the OI Region I Field Office Director (FOD), in about October 1996, the U.S. Attorney's Office in New Haven, Connecticut, verbally requested that OI reports pertaining to Millstone not include the previously mentioned sections. It was the OI FOD's understanding that the U.S. Attorney's request was based on the fact that the results of two recently completed OI investigations had been prematurely leaked to unauthorized parties.

The Director of OI told OIG that he was aware of the agreement between OI Region I and the U.S. Attorney's Office, and he did not object to it. While there was no specific written record of the agreement with the U.S. Attorney's office not to include synopses, conclusions or agents' analyses in the reports, OIG found a reference to it in a January 13, 1997, letter from the Region I OI FOD to an Assistant U.S. Attorney in Connecticut. That letter, which sought permission to disseminate certain OI reports regarding Millstone to senior NRC officials, requested, in part:

“The ability of OI to provide copies of the Reports of Investigation, without agent's analyses or conclusions (per your office's request), but signed and closed by OI, to the five Commissioners, the EDO's office and Dr. Travers.....”

During a January 7, 1997, closed briefing of the Commission regarding the status of OI investigations, the Director of OI was asked by a Deputy EDO about the agreement with DOJ concerning the omitting of written conclusions and agents' analyses from OI reports of investigation related to Millstone. The Deputy EDO commented, “(I)t seems that you have to get to the bottom line for those cases even though you may not convey it to Justice”.

The OI Director responded in the following manner:

The way we've worked this out with DOJ is once they make a determination that they are not going to take the case, we will then put in our agent's analysis and conclusions so the staff could have what is normally their package to deal with on our investigation.

When interviewed by OIG, however, the Director of OI advised that his comments during the Commission briefing were not intended to mean that written conclusions and agents' analyses would be added to the OI reports of investigation following a prosecutive decision from DOJ. The Director of OI told OIG that he intended to convey the message that the OI conclusions and analysis would be articulated by OI representatives during enforcement panels and similar meetings with the NRC staff. He was not aware of any consideration being given to the addition of written conclusions to the reports of investigation at any point in the process. Both the OI Director and the Region I FOD felt that the OI positions on the cases could be expressed verbally during meetings with the NRC staff.

During the time that the U.S. Attorney's office was reviewing the OI reports for prosecutive interest, the NRC was requested by that office to hold decisions regarding possible civil enforcement action in abeyance. OIG found that there was limited dissemination of the Millstone OI reports (without exhibits) to certain senior NRC managers while the cases were pending a decision from the U.S. Attorney. That dissemination was for the limited purpose of ensuring that there were no immediate health and safety issues uncovered in the reports.

In the fall of 1997, at the request of the Region I OI FOD, the U.S. Attorney's office provided "no objection" to the NRC proceeding with decisions on possible civil enforcement action on the four OI cases associated with the January 1996 RIF at NU (OI Case Nos. 1-96-007, 1-96-014, 1-96-034 and 1-96-048). OI made copies of the Reports of Investigation and exhibits available to the appropriate offices within NRC including Office of Enforcement (OE), Office of the General Counsel (OGC) and the Special Projects Office (SPO) for review in determining potential enforcement action. The OI reports made available to the NRC offices still did not include synopses, conclusions or agent's analyses.

An OIG review of the discrimination investigations conducted by OI in connection with the January 1996 RIF disclosed that the pertinent investigative issues were identified and appropriate witnesses interviewed. The interviews were generally thorough and probative in nature. The lack of written conclusions in the OI reports was viewed as a deficiency from the standpoint of assisting agency officials on potential enforcement action decisions.

NRC Conducts Initial Enforcement Panel

On December 2, 1997, an enforcement panel attended by representatives from OE, OI, OGC, SPO, and Region I was held at NRC Headquarters. The Office Directors from OE, OI, and SPO were in attendance at the panel. The four OI investigations associated with the 1996 RIF at Millstone were discussed during the panel. With regard to OI cases 1-96-014, 1-96-034 and 1-96-048, the panel decided that there was insufficient evidence to substantiate the allegations of H&I. The three cases were closed out from an enforcement standpoint by memoranda dated December 3, 1997. One of the cases closed during the enforcement panel (OI case 1-96-014) was one of two instances which the NRC task force leader reported had merit during the April 1996 briefing of senior NRC management. During an OIG interview in connection with this inquiry, the NRC task force leader stated that he did not feel that this case was as strong as the second case 1-96-007 discussed below.

Regarding OI case 1-96-007, OIG learned that a decision was made at the December 2, 1997, enforcement panel to proceed with escalated enforcement action against NU for violation of 10 CFR 50.7 ("Employee Protection") involving discrimination against two, possibly three, employees for engaging in certain protected activities. This conference included a video hook up with Regions I and IV. While virtually all of the attendees pointed out during OIG interviews that at the outset of the conference there was some disagreement as to whether a case of discrimination had been sufficiently substantiated, by the completion of the discussion there was

general agreement to proceed with enforcement action against the licensee. At this meeting, the senior OGC attorney who had headed up the initial NRC task force looking at the RIF process and the Region IV OI investigator who was the principal investigator for OI case 1-96-007 were the strongest proponents for proceeding with an enforcement action (EA). The plan of action developed at the December 1997 enforcement panel called for Region I to prepare a Conference Choice letter to be sent to NU while OE and OGC were to prepare a Commission paper. A Conference Choice letter is a document prepared by the NRC staff and sent to the licensee in situations where the staff believes they have sufficient information to make an informed enforcement decision. The Conference Choice letter affords the licensee the opportunity to respond to the apparent violation in writing or request a predecisional enforcement conference.

The only record uncovered by OIG of the decision reached at the December 2 enforcement panel regarding OI case 1-96-007 is an EA Request and Enforcement Strategy Form which stated the following in the Details section:

Staff concluded that two, possibly three, alleged substantiated allegations of discrimination as reflected in OI Report 1-96-007 and staff analysis of evidence. Region I to draft and issue Conference Choice letter to licensee during week of December 8th. OE & OGC to begin drafting Commission paper & Enforcement Actions - NOV (Notice of Violation) and SL1 (Severity Level 1), Proposed CP (Civil penalty) for 50.7 violations.

The above EA Request and Enforcement Strategy Form prepared by a Senior Enforcement Specialist who attended the meeting also bore the initials of the Director of OE as approving it on December 2, 1997.

OIG learned that in a December 5, 1997, letter to the Assistant U.S. Attorney in New Haven, the Region I FOD wrote the following:

“On Tuesday of this week OI personnel met with representatives of the Office of Enforcement, Office of General Counsel, The Millstone Special Projects Office, and Regional staff to discuss the evidence developed during the OI investigations into charges that the January 1996 layoffs at NU constituted discrimination against certain individuals (Case Nos. 1-96-007, 1-96-014, 1-96-034, and 1-96-048) and an unrelated investigation, involving alleged discrimination of a security guard at Haddam Neck (Case No. 1-96-045). The consensus opinion (preliminary) was that **(name)** and **(name)** (both Case 1-96-007) were discriminated against by the actions of NU’s VP of Engineering **(name)**. The staff discussed citing NU with violations of 10 CFR 50.7 and issuing a \$100,000 Civil penalty for each violation. In addition, they are considering an Order against **(name of NU VP)**, which would prohibit him from licensed activities; however that action would likely be put on hold pending completion of a current OI investigation (Case No. 1-97-007), in which **(name of NU VP)** will be interviewed by OI during the week of December

8th, and their review of another case pending before you (Case No. 1-96-002/**name and name**).”

OIG found that a Conference Choice letter was subsequently drafted by Region I SPO on December 23, 1997, and e-mailed to OE and SPO at NRC Headquarters for concurrence. The “draft” letter stated, in part:

Based on the staff’s review of the NRC’s Office of Investigations report number 1-96-007, the NRC has concluded that engaging in protected activities was a factor in NNECO [Northeast Nuclear Energy Company] management’s decision to terminate a former senior engineer in Electrical Engineering Support and a former engineer in Probabilistic Risk Assessment. This is an apparent violation of 10 C.F.R. 50.7. In making this determination, the NRC considered that for both of these individuals, neither had been recommended for termination as a result of ratings they received using criteria in a matrix created by NNECO as part of a downsizing effort. In both of these cases, the NRC has concluded that the individuals were terminated, in part, because of their association with a former employee who was discriminated against by NNECO.....

Based on the extensiveness of the investigations, the NRC does not consider that further information is necessary to make an informed enforcement decision. However, enforcement action will not be taken for the apparent violations until you have been provided an opportunity to either (1) respond to the apparent violation described in this letter within thirty days of the date of this letter or (2) request a predecisional enforcement (conference). A Notice of Violation is not presently being issued for these findings.

OIG determined that a Commission paper was never prepared by OE or OGC, nor was the above Conference Choice letter ever sent to NU. The only record of the draft Conference Choice letter which could be located by OIG was a copy maintained by the Region I SPO official who drafted the document. OIG found no other action taken by the NRC staff to further the enforcement decision made during the December 2, 1997, enforcement panel.

Initial Enforcement Position Reversed

The Director of OE acknowledged to OIG that the December 2 panel was significant from an enforcement perspective. He cited the significance of the meeting as the attendance by a wide variety of people as well as the high profile Millstone H&I cases which were discussed. The Director of OE acknowledged that his initials on the OE strategy form signified his approval of the decision to proceed with the planned enforcement action. The Director of OE said that the OGC attorney who headed the NRC task force and the OI investigator made forceful arguments for proceeding with enforcement action during the initial panel meeting; however, the Director of OE indicated to OIG that he still had some legal questions about the strength of the case. The

Director of OE could not recall seeing the draft Conference choice letter prepared by Region I SPO. He added that OE processes several hundred potential enforcement actions each year, and it was difficult to know the details on all of the cases.

While he could not recall specific details of any meetings or conversations to discuss his second thoughts over proceeding with enforcement action on OI case 1-96-007, the Director of OE stated to OIG that they did occur. He acknowledged that a Severity Level 1 violation against Millstone for a violation of 10 CFR 50.7 by a Senior Vice President would be a significant action from an enforcement perspective. Additionally, as part of his reason for reconsidering the approach to the case, the Director of OE cited the fact that OI had another ongoing investigation of alleged discrimination involving the same NU vice president. The OE Director acknowledged to OIG that there were several closed Commission briefings to discuss the status of OI investigations related to Millstone. He said that the matter may have been discussed at one of those meetings; however, he had no specific recollection of it being discussed.

OIG learned that although no additional work was conducted on OI Case 1-96-007, at some undetermined point between December 1997 and June 1998, the decision to proceed with enforcement action was reversed. Two OE enforcement specialists indicated to OIG that they voiced their reservations about the case to the Director of OE both prior to and shortly following the December 2 meeting. Both enforcement specialists attended the initial enforcement panel. While not in full agreement with the decision of the panel, both individuals acknowledged to OIG that the panel's decision was to proceed with an enforcement action. However, none of the individuals interviewed by OIG could provide a written record explaining how and why the decision of the December panel was reversed.

OIG determined that on June 9, 1998, another enforcement panel was convened, and as a result of this meeting an official decision was made to not go forward with enforcement action on any of the OI investigations associated with the January 1996 RIF. That panel reversed the decision made during the December 2, 1997, with regard to OI case 1-96-007. The only written record uncovered by OIG of the reversal in position on enforcement action associated with OI case 1-96-007 was a June 9, 1998, enforcement strategy form which indicated that the matter would be closed with no formal action. Most of the attendees at the June 9 panel indicated to OIG that there was very little discussion of the case during the meeting, and they were of the opinion that the panel was merely ratifying a decision which had been made at some other point in time. The Director of OI and SPO were in attendance at the June meeting and did not object to the revised decision. The Director of OE was not at the meeting due to temporary duty away from NRC Headquarters. The Deputy Director of OE was the senior OE person at the panel. The two strongest proponents for proceeding with enforcement action who had been at the initial panel in December 1997 were not present at the June 1998 meeting. The OI investigator had retired in May 1998. The OGC attorney who had been the task force leader was not informed of the panel meeting nor was he subsequently told of the reversal in decision to proceed with enforcement action. OE representatives advised that they informed OGC of the June 1998 panel and felt it was up to OGC to invite the appropriate people. Of all the participants at the June 9 meeting

interviewed by OIG, only one (the senior SPO representative from Region I) acknowledged still voicing an opinion that the case for discrimination had been substantiated in OI case 1-96-007.

The EA Request and Enforcement Strategy Form for the June 9, 1998 meeting states the following:

“Letters that we couldn’t substantiate cases for all allegers sent from Region I. Consensus that we did not substantiate discrimination in all the January 1996 RIF layoffs. OE will close out OI 1-96-007 with a three week memo. No action memo to parties. EA 97-564 is to be closed with no action to be taken. Prepare a letter on 1996 RIF case by week of June 15, 1998.”

The senior OE representative at the June 9, panel was the Deputy Director for the office. His initials appear on the strategy form as the approving official. The Deputy Director advised OIG that he was not present at the December 1997 panel during which the case was initially discussed. The Deputy Director told OIG that prior to the June 1998 panel, the two enforcement specialists from OE who had been at the initial panel told him that, in their opinion, H&I was not substantiated in the case. The Deputy Director advised OIG that there was not a great deal of discussion of OI case 1-96-007 during the June 1998 panel. The panel was more focused on another OI investigation. The OE Deputy Director was unable to explain when the NRC staff decided to change the course of action recommended during the December 1997 panel. While stating that OE was not required to adhere to its initial strategy, the Deputy Director acknowledged that the basis for the change in position should have been documented.

The Director of OI confirmed to OIG that he was present at both the December 2, 1997, and June 9, 1998, enforcement meetings. He told OIG that he did not have a firm opinion as to whether OI investigation 1-96-007 had substantiated H&I on the part of NU with respect to the termination of two employees. He said that he did not feel strongly enough to object to the December 2, 1997, staff decision to proceed with the enforcement action. However, he was more comfortable with the June 1998 decision not to proceed with enforcement action. The Director of OI was aware that the Region I FOD did not feel that an H&I case had been substantiated on OI case 1-96-007.

The Region I FOD advised OIG that he participated in both enforcement panels. He told OIG that from the time OI case 1-96-007 was completed, he did not feel that it had substantiated the claim of H&I. He was aware that the Region IV OI investigator strongly believed that the case had been substantiated. The FOD noted to OIG that while the OI manual outlines a process for resolving disputes between a FOD and an investigator regarding investigative conclusions, that process was not followed in this case since the OI report did not contain a written conclusion. The FOD advised that there was no additional investigation into OI case 1-96-007 conducted between the December 1997 and June 1998 enforcement panels. In his view, the reversal in position was based on additional analysis of the information contained in the closed OI investigation.

The retired Region IV OI investigator who conducted OI investigation 1-96-007 was contacted by OIG. The OI investigator advised OIG that he felt strongly that his investigation had substantiated the claim of H&I.

The OIG attorney who had headed the NRC task force told OIG that he also felt the case for discrimination was substantiated. He recalled that the decision of the December panel was to proceed with action on case 1-96-007; however, he said there was also some discussion of holding off on the enforcement action pending completion of another ongoing investigation involving the same NU official. The senior OGC attorney told OIG that he was not aware of the reason for the ultimate reversal in the enforcement decision. He acknowledged that he was not in attendance at the June 1998 enforcement panel, and he could not recall being informed of such a meeting.

The Director of SPO and his Technical Assistant attended both enforcement panel meetings during which OI case 1-96-007 was discussed. Both told OIG that they read the OI report of investigation prior to the December 2, 1997 panel meeting and did not feel that a case for discrimination had been substantiated. However, neither of them actively participated in the enforcement panel discussion nor did they object to the plan to move forward with enforcement action. The Director of SPO recalled a conversation with the Director of OE shortly following the December panel in which the Director of OE expressed concerns about proceeding with enforcement action. The Director of SPO did not recall seeing the draft Conference Choice letter prepared by Region I.

The OGC attorney assigned to provide legal advice to the NRC staff regarding OI Case 1-96-007 told OIG that he felt the case for H&I was not strong. However, he did not voice an opinion during the December 2 panel meeting. Despite his view on the lack of strength in the case, the attorney said that OGC would have posed “no legal objection” to the staff proceeding with enforcement action.

The OGC supervising attorney told OIG that he had been briefed by the OGC attorney assigned to the enforcement case. The supervising attorney attended the June 8, 1998, panel but was not present at the earlier panel. He explained that the role of OGC was to advise the NRC staff on the strengths and weaknesses in a case. The supervising attorney said that the OGC opinion was that there was sufficient circumstantial evidence to proceed with enforcement action if the NRC staff wished; however, OGC believed that the case would be difficult to prove. The supervising attorney added that while the case was not considered to be a strong one, OGC was prepared to provide the necessary legal support to pursue the matter if the NRC staff decided to proceed with enforcement action.

Review of Closed Commission Briefings on Millstone

There were four closed Commission briefings on investigative matters associated with Millstone between December 1997 and June 1998. Briefings were held on December 11, 1997; February

18, 1998; April 30, 1998; and May 29, 1998. All of the NRC Commissioners were present at the December, February and April briefings. Commissioner DIAZ was the only Commissioner who was not present at the May briefing. The Office Directors of OI, OE, and SPO attended the briefings along with senior representatives from OGC and the Office of the EDO. The NRC Inspector General and Assistant Inspector General for Investigations (AIGI) were present at the meetings for the purpose of providing a separate briefing on OIG matters.

A review of the transcript for the December 11, 1997, meeting by OIG revealed that the Director of OI informed the Commission of the results of the December 2, 1997, enforcement panel. He informed the Commission that there was a preliminary consensus that two of the employees terminated as part of the January 1996 RIF had been the subject of discrimination by a NU Vice President. The Director of OI advised the Commission that the staff was continuing a review of the evidence and transcripts. A discussion then followed between a Commissioner and the Director of OE regarding the amount of fine normally associated with a Severity Level I enforcement action.

In an apparent reference to the same investigation during the next closed Commission briefing on February 18, 1998, the Director of OI indicated that the Staff was “looking at whether in fact discrimination did occur”. The Director indicated that “it’s difficult to say that he (the NU VP) absolutely was involved in making the decision” to terminate the employees in question.

In the April 30, 1998, Commission briefing, both the Director of OE and OI told the Commission that the staff was still reviewing the case involving discrimination; however, they were awaiting the completion of another OI investigation prior to making a final decision on enforcement action. The case which was still pending involved an allegation of discrimination by the same NU vice president.

OIG Review of Pending Discrimination Investigation (1-97-007)

OIG interviews and review of documents disclosed that the pending OI discrimination case referred to during the April 30, 1998, Commission briefing was OI case 1-97-007 (not to be confused with OI case 1-96-007). The OI Report of Investigation was signed by the Director of OI on May 18, 1998. The report was sent to the U.S. Attorney in Connecticut on May 28, 1998. On June 22, 1998, the U.S. Attorney declined prosecution in the matter and returned the case to the NRC for possible enforcement action. Although this case did not contain a written conclusion by OI at the request of the U.S. Attorney, the Region I FOD told OIG that he believed that the claim of H&I had been substantiated. OI case 1-97-007 was not discussed at an NRC enforcement panel until July 28, 1998. The panel decided that no enforcement action should be taken. OI did not appeal the decision of the panel.

NRC Commissioners Provide Views on Investigative Briefings and Staff Enforcement Decisions

The Chairman and Commissioners McGAFFIGAN and DICUS were separately interviewed by OIG. The three Commissioners expressed dissatisfaction with the manner in which the closed briefings on investigations were conducted. Among the problems cited by the Commissioners were the DOJ restrictions calling for the exclusion of their staffs from the briefings as well as restrictions preventing note-taking during the briefings. The Commissioners mentioned that the briefings were confusing and lacked the continuity necessary to follow a specific case from one briefing to the next.

After reviewing the transcript of the December 11, 1997, Commission briefing, all three Commissioners said that they would have expected the NRC staff to inform them of any changes to the plan to take enforcement action as outlined in the briefing. One of the Commissioners said it would have been “good government” for the NRC staff to inform the Commission of any changes in the plan.

When asked if a matter such as this would have impacted their decision regarding the Commission vote on the restart of Millstone, the three Commissioners advised that their decisions were based on assessments of the plant conditions at the time of the vote in June 1998. However, the Chairman said that she would have questioned the licensee more closely in the area of Employee Concerns if there was an enforcement action involving discrimination by a former vice president pending at the time of the restart vote. The three Commissioners expressed concern about how potential enforcement action regarding OI case 1-96-007 was ultimately handled by the NRC staff. One of the Commissioners expressed a view that the staff should have consulted with the Commission prior to closing out the issue. Another Commissioner felt that the staff should have briefed the Commission on the basis for the reversal in their initial position regarding enforcement action.

Commission Issues Staff Requirements Memorandum on Millstone

Following a February 19, 1998, public Commission briefing on Millstone, the Commission promulgated a Staff Requirements Memorandum (M980219A dated March 18, 1998) which directed that all future meetings or reports regarding Millstone include, among other things, the following:

“Crisp, clear analyses of the restart-related issues with recommendations (where appropriate) for the Commission, including those related to enforcement, allegations, and petitions.

Evidence whether the licensee has made sufficient progress and fixed the underlying problems in employee concerns and the corrective action and configuration management processes.”

Two of the Commissioners said that the March 1998 Staff Requirements Memorandum requesting that the NRC staff provide the Commission with crisp and clear analyses of restart-related issues including enforcement actions should have included issues such as the status of the enforcement action on OI case 1-96-007.

NRC Staff Closes Out Allegations Related to January 1996 RIF

OIG learned that on July 20, 1998, a letter was sent to the licensee from Region I SPO advising of the completion of four OI investigations (OI cases 1-96-007, 1-96-014, 1-96-034, and 1-96-048) into the claims of retaliation by multiple employees in connection with the January 1996 RIF at NU. That letter informed the licensee that “(b)ased upon its review of this matter, the NRC staff concluded that there was not sufficient evidence to substantiate the allegations of discrimination”. The letter goes on to state, “In a related matter, we note that you have initiated actions to address the NRC Order dated October 26, 1996, to establish a ‘safety conscious work environment’ program, strengthen leadership skills, and foster a team-building relationship between management and the workforce to preclude future actual or perceived incidents of the type that prompted these investigations”.

In late July 1998, letters were prepared and sent from Region I to the former NU employees who had complained of discrimination to the NRC. OIG learned that the letters were used to administratively closeout the allegations in Region I. The letters sent to the former employees whose cases had not been investigated by OI included the following statement:

Although an OI investigation was not initiated to examine your specific claim of discrimination, the NRC concluded, based on its generic review of NU’s workforce reduction process, that you were not terminated on January 11, 1996, for having raised safety concerns. Your concern was not substantiated.”

The closeout letters containing the above paragraph were drafted and sent from Region I. Interviews of Region I personnel disclosed that the intent of the letter was to convey an agency view on the overall process used by NU in identifying personnel for inclusion in the RIF.

The NRC AAA told OIG that the Region I allegation close out letters sent to the individuals whose cases were not investigated by OI could have been better worded. He felt that a broader statement concerning the overall review of the layoff process would have been more appropriate rather than the statement that an investigation was not conducted and the allegation could not be substantiated. He explained that while there is a strong preference for closeout letters to contain a statement as to whether or not the specific allegation had been substantiated, the situation with the layoff at Millstone was unique since it involved in excess of 20 allegations associated with one event. The AAA did not recall reviewing the closeout letters sent to the allegers by Region I.

OIG Review of Information from Licensee and Region I Allegation Files

As stated earlier in this report, shortly following the January 1996 RIF, Region I requested information from NU on 23 of the employees included on the list of 102 employees terminated by NU. OIG interviews determined that the list of 23 names was compiled based on Region I staff memory and name recognition of employees who had formerly been involved in some sort of protected activity at Millstone. A few other names from the list of 102 employee were added at random by Region I in order to avoid the creation of a list which strictly included the names of individuals known to have raised safety concerns.

OIG found no record of a review of NRC allegation files or licensee Employee Concerns records by the NRC staff as part of their effort to determine if NU management selected employees for termination without regard to past involvement in raising safety concerns. For example, as part of this inquiry, OIG compiled a list of the names of all individuals who made allegations regarding Millstone to Region I. OIG also obtained a list of the 102 employees terminated as part of the January 1996 RIF. Two of the employees terminated as part of the RIF had raised concerns with Region I prior to their terminations.

In response to a request from OIG, the licensee advised that approximately 3200 employees were evaluated as part of the January 1996 RIF process. NU also provided a list of all employees who had formally raised concerns with the NU Employee Concerns Program (ECP) from 1990 to 1996. A comparison of those names with the list of employees terminated in January 1996 disclosed that three of the terminated employees had previously raised formal concerns with the ECP at Millstone. Two of the terminated employees who had previously raised concerns with the Millstone ECP were not included on the Northeast Utilities “Added Assurance” review list.

CONCLUSIONS

1. Pursuant to a verbal agreement with the U.S. Attorney's Office in New Haven, Connecticut, in the fall of 1996, the OI Reports of Investigation related to Millstone which were referred to the Department of Justice (DOJ) did not contain synopses, written conclusions or agents' analyses of information. However, when the cases were returned by DOJ to the NRC for action, OI did not include written conclusions. Consequently, there was no official OI position regarding the results of these OI Reports of Investigations. With respect to OI Case 1-96-007, OI staff had divergent opinions regarding the investigative conclusions in the case. The OI case investigator believed that discrimination had been substantiated against a former NU Vice President, while the Region I FOD believed that it had not. The OI Director, while less certain, tended to agree with the FOD's position. Despite an OI internal procedure which could have been used, this difference in opinions was not resolved prior to the agency's December 1997 enforcement panel
2. During a December 1997 enforcement panel attended by OE, OI, SPO, Region I and OGC, a decision was made to proceed with enforcement action against NU for a Severity Level 1 violation of 10 CFR 50.7 (Employee Protection) in connection with OI Case 1-96-007. During this enforcement panel, the OI case investigator and the NRC task force leader argued convincingly that discrimination had been substantiated against the former NU Vice President. All attendees at the meeting were given the opportunity to express their views. By the end of the meeting, there were no opposing arguments to the panel's decision to proceed with enforcement action. The NRC Commission was subsequently briefed on the proposed action and a draft Conference Choice letter was prepared by Region I. However, OE did not proceed with the planned enforcement action.
3. In June 1998, the NRC staff conducted a second enforcement panel on OI Case 1-96-007. Representatives from OE, OI, SPO, Region I and OGC attended this panel as well. Although there was no new investigative information developed on the case since the December meeting, the panel decided to close the matter without any enforcement action. OIG could find no written record of the reasons supporting the change in position. OIG determined that the decision not to proceed with enforcement action had already been made prior to the June 1998 meeting, and the panel was held to administratively close the case from an enforcement perspective. OIG determined that only minimal discussion of the merits of the case was conducted during this panel. The two strongest proponents for proceeding with enforcement action during the initial panel in December 1997 were not present at the June 1998 panel.
4. During the course of this inquiry, OIG found two occasions related to the handling of the Millstone discrimination cases where the NRC staff's subsequent actions were not consistent with what they had briefed the Commission. In January 1997, the Commission

was briefed that once the OI Reports of Investigation were returned by DOJ, investigative conclusions and agents' analyses would be added to the reports prior to discussion at an NRC enforcement panel. However, OIG learned that conclusions were never added to the OI reports. In another Commission briefing in April 1998, the Commission was told that the staff was awaiting the completion of OI investigation 1-97-007 involving a claim of discrimination against the same former NU Vice President prior to making a decision on enforcement action in related OI case 1-96-007. However, information from the second case was not included in the June 1998 enforcement panel which ultimately reversed the decision of an earlier panel with regard to OI Case 1-96-007. Additionally, with respect to OI Case 1-97-007, the Region I FOD advised OIG that discrimination by the former NU Vice President had been substantiated by OI; however, no enforcement action was taken in that case as well.

5. OIG found that NRC Management Directive 8.8 does not require that all allegations of discrimination be investigated. Consequently, the NRC staff decided to investigate only the allegations which contained the strongest evidence of discrimination. OIG was told that decision was based, in part, on the NRC's position that they need not prove multiple instances of discrimination to take enforcement action against a licensee. Based on the above approach, OIG found that the NRC staff's decision to investigate only the cases which provided the strongest evidence of discrimination was not inappropriate. However, the NRC staff's handling of enforcement action regarding OI case 1-96-007 runs counter to this stated enforcement philosophy.
6. In letters dated in July 1998, from the NRC Region I staff, a number of allegers were informed that their claims of discrimination were not substantiated even though no investigation was conducted. Because the NRC did not conduct an investigation into these allegations, the NRC staff had insufficient information on which to base this conclusion.

CHRONOLOGY OF EVENTS

<u>Date</u>	<u>Event</u>
01/11/96	NU terminates approximately 102 employees as part of Reduction in Force (RIF)
02/08/96	NRC Region I requests information from NU regarding process used in identifying employees to be terminated
02/15/96	NU responds to NRC request of 02/08/96
03/96	NRC forms Task Force to look at NU RIF process
04/19/96	NRC task force briefs NRC senior managers; Directed not to prepare written report; OI to conduct investigations
04/30/96	OI upgrades investigation 1-96-007 to full field investigation and initiates case no. 1-96-014
06/96	NRC designates three Millstone plants as Category 3 plants requiring Commission approval prior to restart
08/14/96	NRC issues Confirmatory Order directing licensee to implement ICAVP
09/11/96	Senior NRC management directs Task Force to prepare written report
10/02/96	Task Force submits written report to NRC senior management; Limited distribution on report.
10/24/96	NRC issues Confirmatory Order directing licensee to develop comprehensive plan for reviewing safety concerns raised by employees
11/21/96	OI case 1-96-007 completed and sent to U.S. Attorney
1/7/97	Commission briefing on status of OI investigations, discusses addition of conclusion to reports
04/23/97	OI case 1-96-014 completed and sent to U.S. Attorney

06/27/97	OI case 1-96-034 completed and sent to U.S. Attorney
08/05/97	OI case 1-96-048 completed and sent to U.S. Attorney
12/02/97	Enforcement Panel meets to discuss OI case 1-96-007; Plan to proceed with Enforcement Action
12/05/97	Correspondence from the Region I FOD to DOJ discussing preliminary enforcement decision to proceed on OI case 1-96-007
12/11/97	Closed briefing for Commission by OI on status of Millstone cases
12/14/97	Public Commission briefing on Millstone
12/23/97	Draft Conference Choice letter provided by Region I SPO to OE and SPO
02/18/98	Closed Commission briefing by OI on status of Millstone cases.
02/19/98	Public Commission briefing on Millstone
03/18/98	Commission directs staff in SRM to provide “crisp, clear analysis of the restart-related issues with recommendations.....including those related to enforcement”
04/02/98	Meeting in OI spaces to discuss status of OI Millstone investigations attended by OI, OE, SPO, OGC, Region I
04/30/98	Closed Commission briefing on Millstone investigative issues
05/01/98	Public Commission briefing on Millstone
05/18/98	Director of OI signs report on OI Case No. 1-97-007
05/28/98	OI Case 1-97-007 forwarded to U.S. Attorney in Connecticut
05/29/98	Closed Commission briefing on status of investigative issues at Millstone
06/02/98	Public Commission briefing on Millstone
06/09/98	Second enforcement panel held. Decision made not to proceed with enforcement action on OI case 1-96-007.

06/15/98	Commission issues SRM providing restart authorization for Millstone 3
06/22/98	U.S. Attorney declines prosecutive interest in OI Case 1-97-007
06/29/98	NRC authorizes NNECO to commence restart action for Millstone 3
07/28/98	Enforcement panel held on OI case 1-97-007; Decision not to proceed with enforcement action